IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1311

STAFFCO OF BROOKLYN, LLC,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

NEW YORK STATE NURSES ASSOCIATION,
Intervenor.

On Appeal from the National Labor Relations Board

Consolidated with 16-1363

PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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June 18, 2018

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GLOSSARY OF ABBREVIATIONS

NLRA	National Labor Relations Act
Board or NLRB	National Labor Relations Board
CBA	Collective Bargaining Agreement
Continuation Policy	The Pension Plan's "Policy for Continuation of Coverage upon Expiration of a Collective Bargaining Agreement"
Decision and Order	The NLRB's Order issued on August 26, 2016, Case No. 29-CA-134148
Panel Decision	The Court's Panel Decision in this matter issued on May 4, 2018, Case No. 16-1311
Pension Plan	New York State Nurses Association Pension Plan
StaffCo	StaffCo of Brooklyn, LLC
Union	New York State Nurses Association

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioner/Cross-Respondent StaffCo of Brooklyn, LLC ("StaffCo") hereby certifies the following:

A. Parties and Amici

i. StaffCo is the Petitioner/Cross-Respondent before this Court, and StaffCo previously appeared as the Respondent in the underlying proceedings before the National Labor Relations Board (the "Board" or "NLRB");

ii. The Board is the Respondent/Cross-Petitioner before this Court, and the General Counsel for the Board previously appeared as a party in the underlying proceedings;

iii. The New York State Nurses Association (the "Union") previously appeared as the Charging Party in the underlying proceedings before the Board and has intervened in the instant proceeding before this Court;

iv. There were no intervenors or amici before the Board; and

v. There are no amici before the Court in this proceeding.

B. The Rulings Under Review

This case is before the Court on StaffCo's Petition for Review of the Decision and Order issued by the Board on August 26, 2016 in the matter of *StaffCo of Brooklyn, LLC* and *New York State Nurses Association*, Case No. 29-CA-134148, reported at 364 NLRB No. 102 (the "Decision and Order"). On May 4, 2018, a panel

of this Court denied StaffCo's Petition for Review and granted the Board's cross-petition for enforcement of the Decision and Order.

C. Related Cases

Other than the prior panel proceedings, this case has not been previously on review before this Court or any other court. Counsel for StaffCo is unaware of any related cases currently pending in this Court or any other court.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, StaffCo hereby certifies: (i) that it is a Limited Liability Company registered under the laws of New York; (ii) that it is based in Brooklyn, New York; (iii) that its sole member is Health Science Center of Brooklyn Foundation, Inc., which is a registered 501(c)(3) non-profit organization; and (iv) that no shares of debt securities of StaffCo have been issued to the public.

/s/ Nicholas M. Reiter
Nicholas M. Reiter

RULE 35 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 35, StaffCo states that the Panel's decision dated May 4, 2018 ("Panel Decision") conflicts with prior decisions of this Court, and *en banc* consideration is necessary to secure and maintain uniformity of the Court's decisions. The precedent with which the Panel Decision conflicts includes: *Oak Harbor Freight Lines, Inc. v. NLRB.*, 855 F.3d 436 (D.C. Cir. 2017); *AT Sys. West, Inc. v. NLRB*, 294 F.3d 136 (D.C. Cir. 2002); *Prime Serv., Inc. v. NLRB*, 266 F.3d 1233 (D.C. Cir. 2001); *Williams Enters., Inc. v. NLRB*, 956 F.2d 1226 (D.C. Cir. 1992); and *Willmar Bank Employees Ass'n v. NLRB*, 644 F.2d 40 (Table) (D.C. Cir. 1981) (enforcing *Citizens Nat'l Bank of Willmar*, 245 NLRB 389 (1979)).

En banc consideration is further necessary because this proceeding presents a question of exceptional importance. This case involves whether StaffCo needed to continue making pension fund contributions *after* its participation in the Union pension fund ended pursuant to the Pension Plan's rules which the parties had adopted within their collective bargaining agreement ("CBA"). This issue is exceptionally important because it greatly impacts collective bargaining relationships throughout the country. Furthermore, the Panel Decision conflicts with the authoritative decisions of another United States Court of Appeals that has

addressed the same issues, namely, *Ohio Edison Co. v. NLRB*, 847 F.3d 806 (6th Cir. 2017).

For all these reasons, which are set forth more fully below, StaffCo respectfully petitions this Court for an *en banc* rehearing.

INTRODUCTION

This case is about a union's waiver of an employer's "status quo" obligation. An employer's "status quo" obligation is derived from Section 8(a)(5) of the NLRA. Under that obligation, when a CBA expires, an employer must maintain the same terms and conditions of employment that existed prior to the CBA's expiration until the employer and labor union either reach impasse or execute a new CBA. *NLRB. v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982).

A union may waive the status quo obligation. Waiver occurs when an employer and union agree in advance that a particular term and condition of employment will end upon expiration of a CBA. *See Oak Harbor*, 855 F.3d at 440. Waiver also occurs when a union fails to diligently request bargaining following notice of an employer's intent to discontinue a particular term or condition of employment. *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003).

Both grounds for waiver are satisfied here. First, the express language within the participation agreement for the New York State Nurses Association Pension Plan ("Pension Plan"), which was adopted within the CBA, stated that StaffCo would no

longer participate in the Pension Plan after the CBA expired. Second, the Union failed to diligently request bargaining after StaffCo notified the Union it intended to stop pension fund contributions in March 2014.

A. The Policy for Continuation of Coverage upon Expiration of a CBA

StaffCo and the Union executed their first CBA effective May 29, 2011 through May 28, 2012. JA126; JA450. Pursuant to the CBA, StaffCo agreed to participate in the Pension Plan effective May 29, 2011. JA159; JA450. StaffCo and the Union also agreed to comply with the requirements set forth in the Pension Plan's "Agreement and Declaration of Trust." JA159; JA450.

The Pension Plan's "Agreement and Declaration of Trust," as amended, sets forth the Pension Plan's "Policy for Continuation of Coverage upon Expiration of a Collective Bargaining Agreement" (the "Continuation Policy"). JA361-67. This policy states that StaffCo's participation in the Pension Plan ends upon expiration of the CBA unless a new CBA has been submitted to the Pension Plan. JA46; JA451. The relevant portion of the Continuation Policy states:

> Upon expiration or termination of a collective bargaining agreement, if [] the employer has not submitted to the Plan Office a new collective bargaining agreement . . . , *the employer's participation in and status as an Employer under the Fund shall forthwith terminate, the service of such employer's employees shall no longer be credited under the Plan*, and the employees of the employer, the employer and the Association, shall be notified in writing, that *the employer is no longer maintaining the Plan and that the covered employment of the employees of the employer terminated* on the expiration/termination date of the collective bargaining agreement.

JA366 (emphasis added).

The Continuation Policy also sets forth a 60-day cure period. JA367. In the event an employer is terminated from the Pension Plan as a result of the expiration of a CBA, the employer may rejoin the Pension Plan without any interruption of pension benefits, provided the employer delivers a new fully-executed CBA within 60 days of the termination of the employer's participation in the Pension Plan. JA367; JA455.

B. StaffCo and the Union's Past Practices

StaffCo and the Union's past practices establish the Union's understanding that pension contributions were supposed to end upon expiration of the CBA. On four occasions from 2012 to 2014, StaffCo and the Union signed CBA extension agreements or interim agreements for the sole purpose of continuing pension fund contributions in accordance with the Continuation Policy. JA386; JA403; JA415; JA418. The Union signed these agreements with StaffCo and submitted these agreements to the Pension Plan because it understood that pension benefits would otherwise end.

The Union has conceded this critical point at least twice. Approximately two months before the expiration of the CBA in 2012, the Union's lead negotiator, Michelle Green ("Ms. Green"), requested StaffCo's lead negotiator, Brian Clark ("Mr. Clark"), arrange for the execution of an interim agreement requiring StaffCo

to continue making pension contributions into the Pension Plan. JA107. Ms. Green's cover e-mail to Mr. Clark was crystal clear. She wrote, in pertinent part: "Hello Brian, We need to send a signed the [sic] Interim Agreement back to the fund (see attachment) *to continue the pension benefit in the event we do not reach an agreement.*" *Id*. (emphasis added and parentheses in original). *See also* JA51. Accordingly, the Union understood that StaffCo's pension contributions would end if StaffCo and the Union did not deliver a signed interim agreement to the Pension Plan before the expiration of the CBA.

Ms. Green admitted (for the second time) the purpose of the CBA extension agreements during her sworn hearing testimony before the NLRB. When asked, "[W]hy did the parties negotiate these contract extension agreements?" she replied, "Primarily because we wanted to make sure that the Pension Fund contributions would continue . . . ." JA35. She further testified that the parties negotiated the contract extension agreements so "that the Pension Plan would accept contributions from the Employer." *Id*.

Ms. Green's admissions and the Union's repeated compliance with the Continuation Policy establish the Union's waiver of the "status quo" obligation. Each time a CBA or an interim agreement approached expiration, the Union arranged for a new agreement in accordance with the Continuation Policy. The

Union never relied on StaffCo's alleged "status quo" obligation until after it "dropped the ball" on bargaining (discussed below).

C. The Expiration of the Final CBA without an Interim Agreement

On March 13, 2014, StaffCo and the Union executed a new CBA extension agreement effective April 1, 2014 to May 22, 2014. JA418; JA454. This was the fourth (and final) time in less than two years that the Union observed the requirements for continuing pension contributions pursuant to the Continuation Policy.

During negotiations for the final CBA extension agreement, StaffCo informed the Union that it would not sign another extension agreement or interim agreement beyond May 22, 2014. JA36-37; JA95-96. StaffCo candidly told the Union that it intended to discontinue pension contributions after that time. JA36-37; JA95-96.

On May 20, 2014 – just two days before the final CBA was scheduled to expire – the Union told StaffCo it needed to "stay current" on pension contributions and that StaffCo and the Union "needed a new agreement." JA10-11. In response, StaffCo directed the Union to speak with StaffCo's lead negotiator, Mr. Clark, about all matters regarding pension contributions. *Id*. The Union, however, never contacted Mr. Clark. JA90.

The final CBA expired on May 22, 2014 without another CBA extension or interim agreement to continue pension contributions. JA455. In accordance with

the Continuation Policy, the Pension Plan notified the Union and StaffCo that pension benefits for the Union's members terminated that same day. JA423-30; JA455. The same notice informed StaffCo and the Union that pension benefits could resume without any interruption in covered employment so long as the parties submitted a new CBA within the 60-day cure period beginning on May 22, 2014. JA423-30; JA455.

D. The Union's Failure to Diligently Request Bargaining

The Union conceded that it never requested bargaining with StaffCo *at any time* during the 60-day cure period. Indeed, the Administrative Law Judge ("ALJ") who presided over the NLRB hearing in this matter specifically determined that "the Union did not request to bargain with StaffCo between May 22 and July 31." JA466 (citing JA55). Neither the NLRB nor the Union took exception from this finding of fact. Accordingly, there is no dispute that the Union never requested bargaining during the 60-day cure period. *See* 29 C.F.R. § 102.46(f) ("Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.").

Instead, the Union waited until July 31, 2014 – ten days after the cure period expired – to finally demand bargaining with StaffCo. JA26; JA40; JA91; JA432-33. The Union requested StaffCo reply to its bargaining request on or before August 6, 2014. JA433.

E. StaffCo and the Union's Subsequent Bargaining Sessions

On August 7, 2014, StaffCo responded to the Union's bargaining request. JA434; JA456. StaffCo offered to attend a bargaining session with the Union, provided the Union identify in advance the specific topics about which it desired bargaining. JA436.

On September 22, 2014, StaffCo and the Union conducted a bargaining session. JA456. During that session, the Union proposed StaffCo rejoin the Pension Plan and make pension contributions retroactive to May 22, 2014. JA456. In response, StaffCo explained it would not resume participation in the Pension Plan because of the anticipated closure of the facilities at which StaffCo employed Union members. JA93-95. During the same bargaining session, StaffCo and the Union also discussed a potential new health benefits package for Union members. JA94.

On November 11, 2014, StaffCo and the Union conducted another bargaining session. JA98-99. As a counter-proposal to the Union's demand that StaffCo resume participation in the Pension Plan, StaffCo offered to enroll the Union's members in StaffCo's defined contribution 403(b) retirement plan. JA99-100; JA457. Under that counter-proposal, StaffCo offered to make retirement plan contributions retroactive to May 22, 2014 on behalf of the Union members who enrolled in the retirement plan. JA29; JA99-100.

The Union rejected StaffCo's counter-proposal out of hand. JA29; JA100. Rather than attempt to meet somewhere in the middle, the Union merely repeated its prior demand that StaffCo resume participation in the Pension Plan. JA29-30. The November 11, 2014 bargaining session ended at that point. On or about December 22, 2014, StaffCo and the Union reached an agreement regarding health benefits, but they remained unable to agree on pension benefits. JA100-01; JA457.

F. Procedural History

On October 31, 2014, the Board filed a Complaint in support of the Union's unfair labor practice charge. JA109-18. After conducting a hearing, the ALJ determined that the Union had not waived StaffCo's "status quo" obligation to continue pension contributions, notwithstanding the Continuation Policy. JA518-21. The ALJ further concluded that the Union diligently requested bargaining about pension benefits after learning of StaffCo's intent to discontinue pension contributions. JA521.

The parties subsequently filed their respective briefs for and against the ALJ's Decision. On August 26, 2016, a divided Board panel issued its Decision and Order. The Board majority adopted the ALJ's findings, whereas the Board dissent determined that the Union's adoption of the Continuation Policy constituted a clear and unmistakeable waiver of StaffCo's status quo obligation to continue pension contributions after expiration of the final CBA. JA509-11.

On May 4, 2018, a panel of this Court denied StaffCo's petition for review and granted the Board's cross-petition for enforcement (the "Panel Decision"). *See* Ex. 1 hereto.

GROUNDS FOR *EN BANC* REHEARING

I. THE PANEL DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

The Panel Decision conflicts with this Court's precedent in two ways. First, the Panel Decision conflicts with the Court's precedent regarding a union's waiver of the status quo obligation when the union fails to diligently request bargaining with an employer. Second, the Panel Decision conflicts with the Court's precedent regarding waiver of the status quo obligation when a labor union and an employer agree in advance about what will happen upon expiration of their CBA. Each of these conflicts is an independent ground for *en banc* rehearing.

A. The Union did not Diligently Request Bargaining

This Court's precedent is clear: "If an employer gives a union advance notice of its intention to make a change to a term or condition of employment, it is incumbent upon the union to act with due diligence in requesting bargaining in order to avoid waiving any of its claims under the NLRA." *Regal Cinemas, Inc.*, 317 F.3d at 314 (citation and internal quotations omitted). A union's bargaining request may be explicit or implicit. *See AT Sys. West, Inc.*, 294 F.3d at 139; *Williams Enters.*, 956 F.2d at 1233. This Court has held that in the case of an implicit bargaining demand,

the union "must at least include some indicia of a demand, such as a suggested meeting place and time, proposed topics, and a method for reply." *Williams Enters.*, 956 F.2d at 1233. An employer does not have to guess about a union's motives. Instead, the union bears the burden of making the employer aware of its desire to bargain. *AT Sys. West, Inc.*, 294 F.3d at 139; *Prime Serv., Inc.*, 266 F.3d at 1238.

In this case, the Panel concluded the Union diligently requested bargaining on May 20, 2014 by doing two things: (1) the Union demanded that StaffCo "remain current" on pension contributions; and (2) the Union demanded StaffCo execute a CBA extension agreement. Ex. 1 hereto at 11-12. There was no other evidence or factual findings cited within the Panel Decision on this issue. *See id*. at 10-12.

The Panel Decision is squarely in conflict with this Court's precedent for what constitutes a diligent bargaining demand. In *Williams Enterprises*, a union representative told an employer that he would like the union to represent the employer's employees and "he would like to have an opportunity to discuss, perhaps negotiate" with the employer. *Williams Enters.*, 956 F.2d at 1233. This Court held that comment was insufficient to constitute a valid bargaining demand. *Id*. This Court explained that the union in *Williams Enterprises* had failed to offer any "indicia of a demand, such as a suggested meeting place and time, proposed topics, and a method for reply." *Id*. *See also AT Sys. West*, 294 F.3d at 139-40 (holding no valid bargaining demand where the union's alleged demand "said nothing about

where bargaining was to take place, when bargaining was to occur, or what subjects would be covered").

The Union in this case did even less than the unions in *Williams Enterprises* and *AT Systems West*. At most, the Union demanded StaffCo "remain current" on pension contributions and execute a new CBA extension. There was never a timely explicit bargaining demand or some indicia of a demand such as a suggested meeting place, meeting time, proposed bargaining topics, or a method by which StaffCo could reply. Further, even assuming *arguendo* such a request was made, the StaffCo employee to whom the request was made directed the Union to contact StaffCo's lead negotiator, which the Union never did. JA90. By the time the Union finally made an explicit bargaining demand on July 31, 2014 – over two months later – it was too late. The cure period had already expired. JA466 (citing JA55). *En banc* rehearing is necessary to resolve this conflict between the Panel Decision and this Court's precedent on this important issue.[2]

[2] The Panel Decision is also in conflict with the Board's own precedent (which this Court later enforced) for what constitutes a valid bargaining demand. The most the Union did before the cure period expired was protest StaffCo's discontinuance of pension contributions. According to the Board, merely protesting an employer's proposed action is not enough to satisfy a union's obligation to demand bargaining. *See Citizens Nat'l Bank of Willmar*, 245 NLRB 389, 389-90 (1979) *enf'd by* 644 F.2d 40 (Table) (D.C. Cir. 1981).

B. The Union Understood that the Continuation Policy Waived the Status Quo Obligation for Post-CBA Pension Contributions

The Panel Decision also conflicts with this Court's precedent for waiver of the status quo obligation by agreement between an employer and a union. *See Oak Harbor*, 855 F.3d at 440. The contract at issue in *Oak Harbor* stated that upon expiration of a CBA, the employer agreed to continue benefit fund contributions "until such time as [the employer or union] either notifies the other party in writing . . . of its intent to cancel such obligation five days after receipt of notice. . . ." *Id*. at 439. This Court determined that the contract in *Oak Harbor* constituted a "clear and unmistakable" waiver of the employer's status quo obligation because the employer had a contractual right to unilaterally cease pension contributions on five days' notice to the union. *Id*. at 442.

When applying *Oak Harbor*, the Panel improperly determined that the Continuation Policy does not afford StaffCo the same right to unilaterally cease pension contributions upon expiration of the CBA. The Panel rejected StaffCo's waiver argument on the ground that it relied upon an inference. Ex. 1 hereto at 8-9. It reasoned that the termination of StaffCo's participation in the Pension Plan did not necessarily mean StaffCo's obligation to contribute to the Pension Plan also terminated. *See id*. That ruling conflicts with this Court's rule that "when an employer acts pursuant to a claim of right under the parties' agreement, the

resolution of that refusal to bargain charge rests on an interpretation of the contract at issue." *Oak Harbor*, 855 F.3d at 440 (citation and quotations omitted).

Any need for an "inference" is obviated by the Union's admissions and past practices. The Union's lead negotiator stated in writing that she negotiated CBA extensions and interim agreements "to continue the pension benefit in the event we do not reach an agreement." JA107. The evidence that the Union *knew* pension contributions would stop upon expiration of the CBA bridges any gap between the Continuation Policy and the contract in *Oak Harbor*[3].

II. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

Two questions presented in this proceeding are exceptionally important and therefore deserve *en banc* rehearing: (1) what must a union do to satisfy its obligation to diligently request bargaining; and (2) what constitutes clear and unmistakable evidence of a union's waiver of the status quo obligation?

[3] The Panel Decision is also in conflict with Board precedent for what constitutes a clear and unmistakable waiver of the status quo obligation. *See Cauthorne Trucking*, 256 NLRB 721, 722, 1981 WL 20510 (1981). The employer and union in *Cauthorne Trucking* adopted contract language under which, upon the expiration of a collective bargaining agreement, the employer's "obligation under [the] Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued. *Id.* The only difference between the contract language in *Cauthorne Trucking* and the Continuation Policy is the use of the word "participation" in lieu of "obligation". And unlike the case at bar, *Cauthorne Trucking* did not include evidence of a union's admissions that CBA extensions were necessary to continue pension benefits. *See* JA107.

A. What Must a Union do to Diligently Request Bargaining?

A question is exceptionally important "if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). This rule applies to the Panel's decision regarding the adequacy of the Union's alleged bargaining demand on May 20, 2014.

In *Ohio Edison Co. v. NLRB*, the Sixth Circuit recently considered whether a union representative's general complaint about an employer's proposed modification constituted a valid bargaining demand. 847 F.3d 806, 808 (6th Cir. 2017). After hearing the employer describe its intention to modify various conditions of employment, the union representative responded: "Oh no you don't! Again? Now you know I have to file a board charge honey… [I will] have to come to Akron [the company headquarters] for this one." *Id*. at 809. A divided NLRB panel held the union representative's comment constituted a valid bargaining demand, but the Sixth Court held otherwise. *Id*. at 811. The court reasoned that, at most, the union representative's comment amounted to a mere protest of the employer's intended actions. *Id*. at 810-11. *Ohio Edison* described the distinction between a protest and an actual bargaining demand as "straightforward." *Id*. at 810. It explained that "to protest is to seek change by expressing disapproval; to request bargaining, in

contrast, is to seek change by signaling a willingness to offer something in return." *Id*. (citing *Black's Law Dictionary* 169 (9th ed. 2009)).

The Panel Decision conflicts with *Ohio Edison*. It is undisputed that the Union did only two things to supposedly demand bargaining implicitly on May 20, 2014 – it demanded StaffCo "remain current" on pension contributions, and it demanded StaffCo sign another CBA extension. JA505. Those limited Union actions fall squarely within the "mere protest" category described in *Ohio Edison*. This conclusion is buttressed by the admitted failure of the Union to pursue its requests with StaffCo's lead negotiator after being directed to do so. JA90. Accordingly, *en banc* rehearing is necessary to resolve the exceptionally important question of what constitutes a valid bargaining demand.

B. What Constitutes a Union's Clear and Unmistakable Waiver of the Status Quo Obligation?

This case also presents the exceptionally important question of what constitutes clear and unmistakable evidence of a union's waiver of the status quo obligation. Per the Continuation Policy, StaffCo and the Union agreed that StaffCo's *participation* in the Pension Plan ended upon expiration of the CBA unless a new CBA or interim agreement was submitted. JA394. The Panel Decision concluded that contract language was insufficient to meet the clear and unmistakable standard for waiver. But the waiver evidence did not end there. On four occasions from 2012 to 2014, the Union acknowledged and complied with the requirements for

continuation of pension benefits under the Continuation Policy. As if this were not enough, the Union twice admitted that CBA extensions or interim agreements were required "to continue the pension benefit." JA107. *En banc* rehearing is appropriate to determine whether the parties' past practices and the Union's admissions as to their understanding of the Continuation Policy is sufficient to meet the clear and unmistakable waiver standard.

CONCLUSION

For the foregoing reasons StaffCo respectfully requests the Court grant the Petition for Rehearing or Rehearing *En Banc*.

Dated: June 18, 2018
New York, New York

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a)(1), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains **3,893** words.

2. The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of this word processing system in preparing this certificate.

Dated: New York, New York
June 18, 2017

/s/ Nicholas M. Reiter
Nicholas M. Reiter

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of June 2018, I electronically filed the foregoing Petition for Panel Rehearing or Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that the foregoing Petition for Panel Rehearing or Rehearing *En Banc* was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Nicholas M. Reiter
Nicholas M. Reiter

EXHIBIT 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 9, 2018 Decided May 4, 2018

No. 16-1311

STAFFCO OF BROOKLYN, LLC,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

NEW YORK STATE NURSES ASSOCIATION,
INTERVENOR

Consolidated with 16-1363

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Nicholas M. Reiter argued the cause for petitioner. With him on the briefs was *Benjamin E. Stockman*. *Moxila A. Upadhyaya* entered an appearance.

Jared D. Cantor, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Richard F. Griffin*, General Counsel at the time the brief was submitted, *John H. Ferguson*, Associate General Counsel, *Linda Dreeben*, Deputy Associate General Counsel, and *Kira Dellinger Vol*, Supervisory Attorney.

Richard M. Seltzer argued the cause for intervenor. With him on the brief was *Kate M. Swearengen*.

Before: PILLARD and WILKINS, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: StaffCo of Brooklyn, LLC ("StaffCo"), petitions for review of a National Labor Relations Board ("NLRB" or "the Board") order finding that StaffCo violated section 8(a)(5) and (1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(5) and (1), by unilaterally discontinuing contributions to a Union pension plan upon the expiration of a collective bargaining agreement ("CBA"). StaffCo contends that: (1) the Union expressly waived its right to bargain as to pension contributions; (2) the Union impliedly waived its right to bargain by failing to diligently request bargaining; and (3) it was impossible for StaffCo to continue making contributions because the pension plan would not have accepted the payments. Because we reject these defenses and the Board's findings are supported by substantial evidence on the record, we deny StaffCo's petition for review and grant the Board's cross-application for enforcement.

I. Background

A. Factual Background

The State University of New York Downstate Medical Center ("SUNY Downstate") contracted with StaffCo to provide non-physician staff at Long Island College Hospital. StaffCo hired nurses and nurse practitioners to staff the Hospital and nearby school clinics run by the Hospital. Intervenor New York State Nurses Association represents the employees as collective bargaining agents and entered into a CBA effective May 29, 2011, through May 28, 2012.

Under the CBA, StaffCo agreed to participate in the Union's pension plan and contribute to it. StaffCo and the Union also agreed to be bound by the terms and provisions of the plan as set out in its Agreement and Declaration of Trust. The admission requirements of the plan dictate that the CBA of an admitted employer must not be inconsistent with the plan itself or its trust agreement. The plan documents include a Policy for Continuation of Coverage Upon Expiration of a Collective Bargaining Agreement ("the Policy"). The Policy sets the conditions on which Plan coverage would continue if a CBA or interim agreement expired. The relevant portion of the Policy states:

> Upon expiration or termination of a collective bargaining agreement, if (i) the employer has not submitted to the Plan Office a new [CBA] which satisfies the requirements of (A) above [for new CBAs] and has not complied with the provisions of (B)(1) above [governing continuation of coverage], or (ii) the employer owes contributions to the Fund for more than two months (without regard to when such

> contributions are payable), the employer's participation in and status as an Employer under the Fund shall forthwith terminate, the service of such employer's employees shall no longer be credited under the Plan, the employer and the Association, shall be notified in writing, and the employees of the employer shall be notified in writing five business days thereafter, that the employer is no longer maintaining the Plan and that the covered employment of the employees of the employer terminated on the expiration/termination date of the [CBA].

After expiration of the initial CBA, the parties signed three extensions and two interim agreements ensuring continuation of pension coverage. The last extension was signed on March 13, 2014, and would expire on May 22, 2014. May 22 was significant because the Hospital was to shut down after that date. That date was also significant because StaffCo would face additional pension liability if it remained in the plan beyond May 22.

SUNY Downstate faced serious financial difficulties as early as 2012. SUNY Downstate's trustees voted to close the Hospital in February 2013, but that closure was repeatedly delayed by litigation involving the Union and other community and labor groups. In February 2014 a settlement was reached that kept the Hospital open through at least May 22, 2014. However, StaffCo continued to employ Union unit members at the Hospital until October 31, 2014—when it closed—and continued to employ four unit employees beyond that date in school clinics. After May 22, 2014, StaffCo neither submitted pension contributions to the Plan nor otherwise made pension contributions for unit employees.

B. Proceedings Below

The Union filed an unfair labor practice charge with the NLRB on August 5, 2014, alleging that StaffCo failed to make payments to the pension plan. StaffCo did not deny that it had ceased making pension contributions. It raised a number of affirmative defenses, three of which form the basis for StaffCo's petition for review. StaffCo first asserted that the Union waived its right to bargain by accepting the adoption in the CBA of the Policy language quoted above. Second, StaffCo argued that the Union received notice of the unilateral change StaffCo planned to make but had failed to timely demand bargaining on the issue, waiving its right to bargain. Finally, StaffCo raised an impossibility defense, arguing that it could not continue to make pension contributions because the plan would not accept contributions absent a CBA or interim agreement. First an administrative law judge and then a panel of the Board resolved all issues against StaffCo.

The administrative law judge found that the Union had not in the Policy clearly and unmistakably waived its right to bargain, made credibility determinations in favor of Union witnesses, found that StaffCo failed to give the Union notice of the impending unilateral change in pension contributions and that the Union had timely demanded bargaining, and found that StaffCo failed to carry its burden on its impossibility defense. A divided Board panel affirmed the ALJ's findings and conclusions. 364 NLRB No. 102 at 1 (2016). StaffCo petitioned this court for review; the Board cross-petitioned for enforcement; and the Union obtained leave to intervene on behalf of the Board.

II. Discussion

Under the Act, an employer has a duty to bargain collectively with a union representing employees. 29 U.S.C. § 158(a)(5). Any unilateral change in an existing term or condition of employment that is a mandatory subject of bargaining is an unfair labor practice. *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962). This rule continues to apply when a CBA expires. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Thus, obligatory terms and conditions of employment must be maintained while a new agreement is negotiated, and this duty to maintain the status quo is statutory rather than contractual. *Id.* at 198, 206-07. Only a new CBA or a good-faith impasse in negotiations ends this duty, unless the union waives its right to bargain. *Triple A Fire Prot., Inc.*, 315 NLRB 409, 414 (1994). A union may expressly waive its right to bargain by a waiver that is "clear and unmistakable" or may implicitly waive by failing to timely demand bargaining. *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 312, 314 (D.C. Cir. 2003).

StaffCo does not deny that by failing to make pension contributions, it failed to meet its status quo obligations. Therefore, we address the three affirmative defenses raised.

A. Express Waiver of the Right to Bargain

We first consider whether the Union waived its right to bargain as to pension contributions by accepting the terms of the Policy. We do not defer to NLRB's legal conclusions interpreting labor agreements. *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 837 (D.C. Cir. 1993). We do, however, defer to NLRB fact-finding if supported by substantial evidence. *See Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 440 (D.C. Cir. 2017). Our deference to NLRB fact-finding extends

to findings related to the contract, including evidence of intent from "bargaining history," *Local Union No. 47, Int'l Bhd. of Elec. Workers v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991), and other "factual findings on matters bearing on the intent of the parties," *Local Union 1395, Int'l Bhd. of Elec. Workers v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986).

The Board and courts have long held that to be effective, a union's express waiver of a statutory right "must be clear and unmistakable." *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In other words, "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" *Id.* Moreover, under our precedent "the party claiming waiver . . . ha[s] the burden of proof." *Oak Harbor*, 855 F.3d at 442. Although this circuit has held that in many cases an antecedent question of contract coverage must be answered before addressing whether clear and unmistakable waiver has occurred, *see generally U.S. Postal Serv.*, 8 F.3d at 836-37, StaffCo does not contend that those precedents govern these facts.

The Policy states that StaffCo's "participation in and status as an Employer" under the plan would "terminate" at CBA expiration, that StaffCo would "no longer maintain[] the Plan," and that employees' service "shall no longer be credited under the Plan." Therefore, StaffCo contends the Policy effects a waiver of the Union's right to bargain over pension contributions. StaffCo argues that we recently addressed similar language in a pension plan document in *Oak Harbor Freight Lines v. NLRB* and found a waiver of the right to bargain. 855 F.3d at 439, 441-42. However, the pension plan language in *Oak Harbor* is distinguishable.

In *Oak Harbor*, the relevant pension fund document expressly gave the employer the right to unilaterally cease making payments to the pension plan:

> Upon expiration of the current or any subsequent bargaining agreement requiring contributions, the employer agrees to continue to contribute to the trust in the same manner and amount as required in the most recent expired bargaining agreement until such time as the [employer or union] either notifies the other party in writing . . . *of its intent to cancel such obligation* five days after receipt of notice or enter[s] into a successor bargaining agreement.

Id. at 439 (emphasis added). This language expressly grants the employer the right to cease making payments without violating its status quo obligations to the Union, and to do so unilaterally—the employer must continue making payments "until" either it or the union "notifies the other party in writing . . . of its intent to cancel such obligation." *Id.* In short, the employer in *Oak Harbor* could "cancel [its] obligation." *Id.* The language in this case is not so clear and unmistakable.

StaffCo points to no language in the Policy that expressly provides it with a unilateral right to cease making pension contributions. To conclude from the Policy language that StaffCo can unilaterally cease making contributions depends on an inference. That StaffCo's "participation in and status as an Employer . . . terminate[s]," that employee service "shall no longer be credited," and that StaffCo will "no longer maintain[] the plan" upon expiration of a CBA or interim agreement do not expressly grant a right to end contributions—all require a further inference. The end of StaffCo's "participation" in or "maintenance" of the plan does not necessarily require such an

inference. Rather, as the Board found, the Policy language could be read to clarify StaffCo's position as to the pension plan, not with regard to the Union, and therefore the Policy lacks the clarity needed to waive the Union's right to bargain about the pension contributions. Under the clear and unmistakable waiver rule, which places the burden on StaffCo, the Policy language falls short of establishing waiver.

StaffCo argues that the Board improperly distinguished its own precedent in *Cauthorne Trucking*, 256 NLRB 721 (1981), where the Board found waiver of the right to bargain. Like *Oak Harbor*, however, *Cauthorne* is distinguishable from this case. *Cauthorne*'s pension document clearly stated that "any [Employer's] obligation . . . shall terminate" at CBA expiration. 256 NLRB at 722. Moreover, the Board's finding of no waiver in this case accords with its practice of "appl[ying] *Cauthorne* . . . 'narrowly,'" only finding waiver "where there is explicit contract language authorizing an employer to cancel its obligations." *Oak Harbor*, 855 F.3d at 441-42 (quoting *The Finley Hosp.*, 359 NLRB 156, 159 n.5 (2012)). The Board properly distinguished *Cauthorne*.

StaffCo also attempts to rely on evidence of the parties' past practices to bolster its case that the Union waived its right to bargain. Specifically, StaffCo points to (1) the Union's quickly moving to have four different interim or extension agreements approved and (2) testimony by Union witnesses and other evidence that StaffCo claims show the Union understood an extension was necessary to ensure pension contributions continued.

The portions of the record StaffCo relies upon do not unambiguously show that the Union understood that interim agreements were necessary for contributions to continue, much less that the Union understood the Policy to waive its right to

bargain. That the Union moved quickly to ensure CBA extensions were in place shows at most that it had some concern that motivated it to act, not that ensuring pension contributions was its concern. One Union witness, Michelle Green, did state that the Union was anxious to get an extension of the CBA because "we wanted to make sure that the Pension Fund contributions would continue from – – that the Pension Fund would accept contributions from the Employer." This statement itself is not crystalline, and in an email Green stated that the reason to pursue an interim agreement is "to continue the pension benefit." The Board considered this evidence and resolved any conflict against StaffCo. Even though the record is not unambiguous, substantial evidence supports that finding.

B. Implied Waiver By Failure to Timely Demand Bargaining

We next consider petitioner's argument that the Board erred by "never consider[ing] StaffCo's alternative argument that the Union's failure to diligently request bargaining about pension benefits waived the status quo obligation." As with the first argument, petitioner is able to find some support in the record and our precedents, but also as with the first argument, it is insufficient for us to upset the findings and conclusions of the Board.

Substantively, petitioner relies on well-established principles of labor law. As we have held, "[i]f an employer gives a union advance notice of its intention to make a change to a term or condition of employment, 'it is incumbent upon the [u]nion to act with due diligence in requesting bargaining.'" *Regal Cinemas*, 317 F.3d at 314 (quoting *Golden Bay Freight Lines*, 267 NLRB 1073, 1080 (1983)). Failure to demand bargaining after receiving notice of a planned unilateral change waives the Union's right to bargain. *See id.* While "[t]he

burden is on the union to make its desires known," it need not "explicitly demand bargaining." *Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1238 (D.C. Cir. 2001). That is, "[a] union need utter no particular words," and "[t]he demand may be in writing or it may be oral," but "some indicia of a demand" must be provided. *Id.*

StaffCo argues that unrebutted evidence in the record establishes that it provided notice to the Union and the Union then failed to timely demand bargaining. We address only whether the Union timely requested bargaining. Because the Board's determination that it did is supported by substantial evidence, we cannot find fault with the Board's ultimate finding that the Union did not impliedly waive its right to bargain.

While StaffCo argues that the Board ignored this argument, and that the Board made no explicit findings as to which the deferential standard of review can be applied, we disagree. The ALJ made explicit findings and recited relevant evidence and specifically rejected the argument. The Board expressly "affirm[ed] the judge's rulings, findings, and conclusions" without excluding the portion of it dealing with this subject. We grant that the judge's findings were terse, but tolerably so. We further grant that the Board's performance on this issue may be the bare minimum warranting deference, but it does reach the bare minimum.

Significant for our review, the ALJ found credible the testimony of Union witnesses "that the Union was seeking an extension to the [CBA] since May 20 and repeatedly requested that [StaffCo] continue with its pension contributions." The testimony credited included evidence that Eric Smith, a Union official, at a May 20 labor-management meeting attended by StaffCo's CEO and an Assistant Vice President for Human

Resources had requested that StaffCo remain current on its pension obligations and sign a new extension of the CBA to cover employees who would remain at LICH beyond the May 22 layoffs. The Board majority adopted this finding after "carefully examin[ing] the record and find[ing] no basis for reversing the [credibility] findings."

"The court will not overturn the Board's acceptance of an ALJ's resolution of conflicting testimony unless the ALJ's determinations are 'hopelessly incredible' or 'self-contradictory.'" *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005) (quoting *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988)). The arguments offered by StaffCo do not reach this stringent standard. Substantial evidence on the record supports the Board's finding that the Union timely demanded bargaining.

C. Impossibility

StaffCo's final argument raises the affirmative defense of impossibility. StaffCo argues that the pension plan would have rejected any status quo payments made after expiration of the CBA. The Board rejected this argument, finding that StaffCo had failed to meet its burden of showing that the plan would have refused payment. We agree. StaffCo's arguments are not without convincing force. The gist of the relevant portion of the plan set out above is that employers with terminated CBAs should not expect to continue membership in the plan. However, the record still falls short of establishing factual impossibility on this issue where StaffCo bears the burden. There is no evidence that StaffCo tendered payments and was refused. There is no evidence that StaffCo attempted a substitute compliance by some means such as the establishment of an escrow. *Cf. Clear Pine Mouldings*, 238 NLRB 69, 80 (1978) (no violation where the employer "had only deposited

the money in a bank account for disposition upon bargaining [and] could do little else for the trust would not take it"). Given the standard of review, we do not upset the Board's "'reasonably defensible' interpretation of the facts." *W & M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008) (quoting *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000)).

III. Conclusion

For the foregoing reasons, we deny StaffCo's petition for review and grant the Board's cross-application to enforce its order.